ACCU CHEM CONVERSION, INC.

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March 26, 2009

Governor's Office of Emergency Services
% Director Henry Renteria
3650 Schriever Ave.
Mather, CA 95655

Regarding: Technical Rebuttal To;
DTSC Hearing Decision dated March 9, 2009
Sent Certified Mail: 7007 1490 0001 4756 9093

Certified Mail tracking # 7007 3020 0002 5728 3765

Dear Director Renteria,

ACCU CHEM Conversion, Inc. [ACC] is in receipt of the above stated hearing decision and after careful review we find many of the conclusions reached by the DTSC [the local CUPA for the County of Imperial, CA] to be drawn from only selected doctrines out of all the information we supplied. We believe that this was a key factor which lead DTSC astray in their decision making process. Further, we find that DTSC specifically chose to overlook findings of other regulatory bodies in this process. Moreover, we have sufficient proof to show that DTSC based their decision on information that would allow them to come to a specific determination that was, in our opinion, biased. It is for these reasons that we are pursuing the appeals process through The Governor's Office of Emergency Services [OES].

I must preface what follows by informing you of two items. First, I am a degreed chemist so I know more about hydrochloric acid than most and much of what was stated in the hearing decision regarding hydrogen chloride and hydrochloric acid simply was not technically factual. Also, I am the one that authored the letter to Pipeline and Hazardous Materials Safety Administration [PHMSA] initiating the concept of "Transloading" during the open comment period of NPRM of HM- 223 so I am knowledgeable regarding this subject. I have attached a copy herein along with a portion of the original final rule.

I will now go through the DTSC's determination and rebut the bases of their facts and conclusions.

On page 4 under **ANALYSIS**, first paragraph, the DTSC state "The term hydrogen chloride and hydrochloric acid are frequently used interchangeably, therefore a few introductory comments on the chemistry of the substance are helpful."

Hydrogen chloride is **in no way** the same substance as hydrochloric acid. Here are the definitions form a well known technical archive;

The compound **hydrogen chloride** has the formula HCl. At room temperature, it is a colorless gas, which forms white fumes of hydrochloric acid upon contact with atmospheric humidity. Hydrogen chloride gas and hydrochloric acid are important in technology and industry. The formula HCl is often used to refer, somewhat misleadingly, to

hydrochloric acid, an aqueous solution derived from hydrogen chloride.

Please pay specific attention to the sentence that reads "The formula HCl is often used to refer, **somewhat misleadingly**, to hydrochloric acid, an **aqueous solution** derived from **hydrogen chloride**." It is important that the difference here is understood.

Hydrogen chloride is composed of diatomic molecules, each consisting of a hydrogen atom H and a chlorine atom Cl connected by a covalent single bond. Since the chlorine atom is much more electronegative than the hydrogen atom, the covalent bond between the two atoms is quite polar. Consequently, the molecule has a large dipole moment with a negative partial charge δ^- at the chlorine atom and a positive partial charge δ^+ at the hydrogen atom. In part due to its high polarity, HCl is very soluble in water (and in other polar solvents).

Upon contact, H_2O and HCl combine to form hydronium cations H_3O^+ and chloride anions Cl^- through a chemical reaction:

$$HCl + H_2O \rightarrow H_3O^+ + Cl^-$$

The resulting solution is called hydrochloric acid. The acid dissociation or ionization constant, K_a, is large, which means HCl dissociates or ionizes completely in water.

Because of its acidic nature, hydrogen chloride is a corrosive gas, particularly in the presence of any moisture.

As stated above, hydrogen chloride [HCL] is a gas that cannot exist at standard temperatures and pressures because it **"dissociates or ionizes completely"** into water upon contact with it. This will happen in the presents of any water, including water in the atmosphere. This is to say that when HCL is added to water it no longer exists as HCL because it goes through a chemical reaction to form hydrochloric acid [A + B = C + D, as stated above]. Whereas oxygen, for example, can mix into water but does not chemically change it form, or dissociates in the mixture. The oxygen can be driven out of the water unchanged, but hydrogen chloride cannot because it will completely break apart into its elemental atoms, in the presents of water. This type of mixture is known as an azeotropic mixture, a unique type of mixture. In such a mixture the original components [called the reactants or substrates] no longer exists in their original form after coming in contact with each other, in its place is a new compound [a product], in this case hydrochloric acid. The reason that this mixture tries to stay at 20.2 percent by weight is because this percentage represents its lowest energy state of the mixture. Once HCL [anhydrous hydrogen chloride] dissociates into water, it will not come out of the mixture and re-combine to form HCL [a gas], not even when distilled. Please see the textbook definition below.

An **azeotrope** (pronounced /ay-ZEE-ə-trope/) is a mixture of two or more liquids (chemicals) in such a ratio that its composition cannot be changed by simple distillation. This occurs because, when an azeotrope is boiled, the resulting vapor has the same ratio of constituents as the original mixture.

Based on this, it is not possible to have a release of HCL [gas] form a package containing hydrochloric acid into the environment. Whereas, it is completely possible to have a release of hydrochloric acid vapor from said package.

In the next paragraph DTSC states an opinion that pure hydrogen chloride gas exists in the absence of water and is referred to as anhydrous hydrogen chloride. We agree that it exists under certain controlled and confined conditions but to have it exist at standard temperature and pressure and out in open space, one would have to be able to alter the laws of the physical universe. This is why ALL Material Safety Data Sheets [MSDS's] for hydrochloric acid from a 32% to 40% concentration of HCL in water show **hydrogen chloride, aqueous** under synonyms. The word *aqueous* means that the hydrogen chloride gas is completely dissolved in water.
On page 8 under **Conclusion on regulation of hydrochloric acid** DTSC states "applying the

above principles to the California Accidental Release Program, we note that hydrogen chloride is listed as "hydrogen chloride (gas only)" as a Table 3 chemical with a threshold designation of 500 pounds per process in the California Code of Regulations, title 19, section 2770.5. ... Because the listing for hydrogen chloride does not contain a concentration listing, the 1% rule for mixtures and solutions would apply."

We do not agree with this conclusion. We believe that Table 3 mentioned above **does** contain a concentration, it refers to hydrogen chloride, anhydrous, a 100% pure form of HCL [a gas] void of any and all water, this is what we take the words **"gas only"** to mean. In our discussion above we gave a clear and concise explanation of the chemistry and relationship between hydrogen chloride [a gas] and hydrochloric acid [a liquid]. We showed that once HCL dissociates into water it can no longer exists in its pure anhydrous form. Therefore, the 1% rule has no basis here because "hydrogen chloride (gas only)" does not exist in hydrochloric acid irrespective of concentration.

Remember that an azeotropic mixture when boiled will maintain the same concentrations of all components in the vapor phase as is in the liquid phase. There is no separation of the individual constituents at standard temperature and pressure, even when this mixture is boiled.

Table 3 out of the CalARP Program Regulations does not list hydrochloric acid at any concentration; therefore, this compound is not regulated under the CalARP Program.

We are now moving to page 10, **ANALYSIS, I. Transloading** DTSC begins by reciting the paragraph published in the Federal Register (68 Fed. Reg. 61919 (Oct. 30, 2003).) Please review the enclosed excerpts of this document, upon close observation you will see that this definition came right out of my letter to PHMSA.

On page 12 DTSC recites PHMSA's refining of the term transloading of particular interest are paragraphs 2 and 4, please see below.

2. In Sec. 171.1, we are revising paragraph (c)(4) to indicate that" storage incidental to movement" includes storage at the destination indicated on a shipping document if the original shipping document includes information that the shipment is a through shipment to an identified final destination. For example, a shipping paper prepared by the person offering a hazardous material for transportation in commerce may show the shipment destination as a transloading facility; provided that the shipping paper or other documentation includes information that the shipment is a through-shipment and identifies the final destination or destinations of the hazardous material, storage at the facility is "storage incidental to movement" and subject to regulation under the HMR. Note that such storage must be of the hazardous material in its original packaging (i.e., the rail tank car) or its transloaded packaging (i.e., a cargo tank motor vehicle) in order to be considered "storage incidental to movement." Note also that storage of a hazardous material after delivery to its final destination is not" storage incidental to movement" and not subject to regulation under the HMR.

The paragraph above states that if a shipment is to be transloaded in order to continue the shipment in commerce it must so be stated either on the "shipping paper or other documentation" as a "through shipment." The key phrase here is "**other documentation**."

We admit that it would be simply cleaner to have this information show up on the shipping document and to this end ACC is working with the shipper [Olin] to add this information. However, during the December 15, 2008 hearing ACC submitted many documents that clearly show that the hydrochloric acid [product] we handle is indeed a through-shipment. We showed DTSC a contract between Pioneer Chlor-Alkali, LLC and ACC called "TRANSLOADING AGREEMENT" in this document it states that Pioneer shall maintain title of the product until

sold and that ACC domicile, transload, and ship said product as directed. The shipping papers that are used to take the product to its final destination have always been generated by Pioneer. Pioneer has always been in control of their product during its entire journey in commerce up to the point that it is unloaded into their customer's above ground storage tank(s) which is the HM's final destination and signifies the end of its transportation in commerce. We have a fifteen year history of taking product to the same location which is thirty-five miles from our transloading operation. ACC does not nor has it ever made its own shipping papers for the movement of this product. To this end we have always had "other documents" to show that this product, a hazardous material, is a through-shipment which meets the definition in 49 CFR 171.1 (c) (4). Based on this, we believe that we are a transloading operation and our operation falls under the HMR. We have spent a large amount of time and money on research and legal counsel to prove this to the DTSC however; they simply chose to overlook these items and their significance.

I will address paragraph four [4] later in this letter.

On page 13 the DTSC discusses an explanation given by PHMSA on October 30, 2003 that was published in the Federal Register. The passage reads;

"Note that, for purposes of the HMR, "transloading" does not include operations that involve the transfer of a hazardous material from one packaging to another for purposes of mixing, blending, or otherwise altering the hazardous materials. Further, "transloading" does not include movement of product to or from a bulk storage tank. For purposes of the HMR, "transloading" is a pure transfer from one bulk package to another at an intermodal transfer facility;" (68 Fed. Reg. 61919 (Oct. 30, 2003)

In DTSC Conclusion for Material Transfer and Transloading DTSC states that "ACC's own procedure indicates the hydrochloric acid may be diluted in the transfer process. Because the material is altered in the transfer operation, the activity will not qualify as "transloading" which is regulated as a transportation activity."

DTSC goes on to say;

"The dilution of the material is sufficient to conclude that ACCU CHEM Conversion, Inc.'s operation does not qualify as "transloading".

The excerpt that DTSC sights above is a clarification written by PHMSA in which DTSC uses to make some unorthodox conclusions. For instance, whose definition did DTSC use to conclude that dilution of the product was in fact an alteration of the product? The terms dilution and alteration are not defined in 49 CFR Section 171.8. Did DTSC consult with PHMSA, USDOT, FRA, or PUC when drawing this conclusion? Or did DTSC draw their own conclusion? The DTSC a [state agency] is attempting to interpret federal regulations without consulting with someone from PHMSA or the PUC/FRA before making this assumption. DTSC had the responsibility to obtain some kind of formal written response from PHMSA on their intended meaning of the word alteration as it applies in this particular context because they authored this code section. DTSC does not have the authority to interpret the HMR or any code(s) relevant to it, that job belongs to PHMSA.

ACC does **NOT** transfer hydrochloric acid [a hazardous material] from one DOT package to another for the purpose of mixing, blending, or altering the product. We transfer the product to further its movement in commerce, towards its final destination. This fits the definition of "transloading."

Pioneer [now Olin] sometimes sends us 36.9% hydrochloric acid and sometimes they send us 32%. The reason the higher strength acid is shipped to us and we are asked to dilute it is due to the fact that a freight savings is realized by shipping a higher concentration of acid. The philosophy is, why pay to ship water when it is available everywhere.

When ACC adds water to the product we are adding more of one of the two chemicals that are already present in the azeotropic mixture when it arrives to us. With specific regard to furthering the HM in commerce, when ACC adds more water to the product, we do not change any of its physical or chemical properties. The MSDS does not change, nor does the NIOSH Guide Book or The Handbook of Chemistry and Physics, or the Emergency Response Guide Book, or any other guide on the safe handling of hydrochloric acid. When in commerce, the acid is handled in the exact same way at 32% as it is at 36.9%. Based on this the product is not altered when diluted. This means that ACC does "Transload" hazardous materials as described in the HMR and as such these activities are governed under the HMR.

On page 16 under; **IV. ACCU CHEM FACILITY USE OF TRACK SIDING** and continuing on page 17 DTSC discuss in detail the concepts surrounding "private track or siding". In their conclusion they state;

"The exclusive use of the track siding by ACCUCHEM Conversion, Inc. means the track is not under the control of the general system railroad. As such, the rail cars stored on the track are not stored incidental to movement. They are therefore not regulated under the HMR."

What DTSC fails to mention is that ACC addressed this topic during the dispute resolution hearing and provided documents on this issue at said hearing. The document was in the section labeled DOCUMENTS 2. I have provided it here again as an attachment. The section reads;

"We agree with the appellants that storage of hazardous materials at transloading facilities is storage incidental to movement and subject to regulations applicable to such storage under the HMR. (70 Fed. Reg. 20020 (April 15, 2005).)"

There is no mention of private track or siding in PHMSA's comment. Moreover, this comment falls under the heading **III Appeals Granted**. We take this to mean that when PHMSA considers if an operation is one of transloading or not, the issue of private track or siding has no bearing on their decision.

DTSC has referenced to this same document several times in their hearing decision, DTSC must have read this. Why wasn't it mentioned or considered in their decision?

On page 18 under **Analysis of Storage Incidental to Movement** DTSC cites the following out of Title 49, CFR, Section 171.1(c) (4)(i);

(i) Storage incidental to movement includes—

(A) Storage at the destination shown on a shipping document, including storage at a transloading facility, provided the original shipping documentation identifies the shipment as a through-shipment and identifies the final destination or destinations of the hazardous material; and

(B) A rail car containing a hazardous material that is stored on track that does not meet the definition of "private track or siding" in §171.8, even if the car has been delivered to the destination shown on the shipping document.

(ii) Storage incidental to movement does not include storage of a hazardous material at its final destination as shown on a shipping document.

DTSC goes on to explain that the word AND ties both paragraphs together and that both conditions must be met. DTSC also states that because ACC owns its rail sidings it is "private track" and the HMR does not allow for "transloading" operations to be performed on "private track" so by default ACC does not "transload."

I have already addressed paragraph (A) above earlier in this letter, I will do so now with paragraph (B).

On page 12 DTSC referenced the following;

4. In Sec. 171.8, we are revising the definition of 'transloading" by removing the phrase" at an intermodal transfer facility" to clarify that transloading is regulated under the HMR irrespective of the location at which the operation occurs. We are also clarifying in the revised definition that transloading when performed by any person is regulated under the HMR.((70 Fed. Reg. 20020 (April 15, 2005).)

As you can see by the phrase; "...transloading is regulated under the HMR irrespective of the location at which the operation occurs." We take to mean that "transloading" can occur anywhere, even on "private track or siding" and the act of "transloading" on said track has no bearing and plays no part during the transfer operation.

We have also found a PHMSA letter of interpretation that applies here. It reads;

This is in response to your November 23,' 2005 letter requesting clarification of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). Specifically, you ask if temporary storage of a railroad car containing hazardous material on a leased railroad spur is considered to be "in transportation." In addition, you ask if the shipper or carrier is financially responsible for any release during transportation. Your question pertains to the following scenario:

A shipper consigns a shipment of a Class 3 (Flammable liquid) material from a vendor's facility in Alabama to its processing plant in Mississippi. Initially, the shipment is carried in trucks via public highway to a private rail yard. The shipment is then transloaded from the trucks to a railcar. The railcar is stored on a leased railroad spur for a period of 1-3 days before it is picked up by the rail carrier and transported to its final destination.

In the scenario you describe in your November 23 letter, the storage of the hazardous material in a railcar located on a leased railroad spur is considered to be "in transportation" for purposes of the HMR. See § 171.1(c). Specifically, in the scenario you describe, the storage of the material at the rail yard is "storage incidental to movement" and subject to all applicable HMR requirements. The HMR define "storage incidental to movement" to include "storage of a transport vehicle, freight container, or package containing a hazardous material by any person between the time that a carrier takes physical possession of the hazardous material for the purpose of transporting it in commerce until the package containing the hazardous material is physically delivered to the destination indicated on a shipping document, package marking, or other medium." See § 171.8. Storage incidental to movement also includes storage at a transloading facility. See §171.1(c)(4). [Ref. No. 05-0313].

As you can see, the hazardous material [HM] is transloaded from cargo tank to rail tank car inside a private rail yard and then is stored on a leased railroad spur until the carrier picks it up. In this case neither the private rail yard nor the leased railroad spur are under the control of the general system railroad. PHMSA states in this interpretation that the storage of the material at the rail yard is "storage incidental to movement" and subject to all applicable HMR requirements.

ACC's operation is analogous to the operation stated in the scenario given above for this reasons we believe that our operation falls under the HMR as well.

When you consider these three statements made by PHMSA;

1] We agree with the appellants that storage of hazardous materials at transloading facilities is storage incidental to movement and subject to regulations applicable to such storage under the HMR.

2] Transloading is regulated under the HMR irrespective of the location at which the operation occurs.

3] The storage of the material at the rail yard is "storage incidental to movement" and subject to all applicable HMR requirements.

There can be no doubt that a "transloading' operation is "storage incidental to movement" regardless of whether or not the track or siding is privately held or leased.

On page 13 in the last paragraph DTSC states; "...However, additional factors related to shipping papers, use of the railroad track storage and the attachment of motive power confirm that these operations do not fit the definition of transloading."

This statement is footnoted. The footnote is on page 21 and reads;

While not necessary to examine as part of this decision, EPA considers a container to be in transportation as long as it is attached to the motive power that delivered it to the site (e.g., a truck or locomotive). If a container remains attached to the motive power that delivered it to the site, even if a facility accepts delivery, it would be in transportation, and the contents would not be subject to threshold determination. As stated earlier, EPA will continue to work with DOT to avoid regulatory confusion. (63 Fed. Reg. 643 (Jan 6, 1998).)

"Here, the rail cars are delivered to the petitioner's property and the motive power is removed. The cars are moved on the petitioner's property by petitioner using their own equipment. However, since 1998, it has become clear that the removal of motive power is but one indicia of whether a container is not in transportation."

The reference in the Federal Register Volume 63, page 643 (Jan 6, 1998) to motive power was written by Federal EPA as a clarification of regulatory boundaries [where one regulatory authorities jurisdictions ends and another's begins] between the EPA and the DOT, it also has relevance to other regulatory authorities. I believe that it has its origins in 49 CFR Section 177.834 (2) (iii) which reads;

"A motor carrier who transports hazardous materials by a cargo tank must ensure that the cargo tank is attended by a qualified person at all times during unloading. However, the carrier's obligation to ensure attendance during unloading ceases when... The motive power has been removed from the cargo tank and removed from the premises."

The EPA clarification is eleven years old and is not substantively the same as many of PHMSA's current regulations released in The Federal Register in October 2003 and again in April 2005. By this I mean that the concept of "transloading" was not part of the regulator vernacular in 1998. It is my opinion that the EPA motive power clarification is antiquated and needs to be re-thought and rewritten as to keep in step with current codes.

In light of the concept of "transloading", we question the relevance of the EPA motive power clarification statement as practically all of the DOT specification packages at a transloading facility or site would not have any type of motive power connected to them before, during, or after the transloading operation. However, all of these DOT specification packages and operations [including transfer equipment and qualified person(s)] are indeed under the regulatory authority of the HMR.

We will now discuss the DTSC's hearing decision. DTSC came to the conclusion that ACC is not a "transloader" as defined under the HMR. The DTSC also concluded that ACC should be regulated under the CAL-ARP Program. ACC has shown that this decision was based on only selected pieces of information brought together to lead the DTSC to the decision they wanted to reach. DTSC's discussion on the chemistry of hydrogen chloride [a gas] verses hydrochloric acid [an azeotropic mixture] was simply not factual. It doesn't matter how hard the DTSC tries, hydrogen chloride and hydrochloric acid are not and never will be the same chemical regardless of the fact that they share the same Chemical Abstracts Service [CAS] Number. Moreover, hydrochloric acid 36.9% and lower is not listed in tables one [1] and two [2] of the Federal EPA-ARP Program nor is it in table three [3] of the CAL-ARP Program Regulations, and therefore compliance under the program is not warranted.

Here are where our main objections lie with DTSC's hearing decision. Other professionals from other regulatory agencies were asked to observe our operation and comment among these were Mary Wesling with Federal EPA, Jonah Lennear with the FRA, Region 7, James Harris with the PUC and Ernie Sirotek also with the FRA, Region 7. On February 23, 2009 Mr. Sirotek sent an email to the DTSC Calexico, CA office, the email was sent to Mr. Ryan Atencio and reads as follows;

From: Sirotek, Ernie <FRA>
Sent: Monday, February 23, 2009 9:23 AM
To: 'Wesling.Mary@epamail.epa.gov'; 'retencio@dtsc.ca.gov'
Cc: Patten, Patrick <FRA>; Lennear, Jonah <FRA>
Subject: FW: Accuchem Investigation

Mary/Ryan,

We have completed our investigation of Accuchem's operation in El Centro, CA. Results of our investigation has determined that Accuchem's operation of removing material from tank cars and continuing transportation by cargo tank to final destination meets the definition of a "transloading" operation as defined in 49 CFR §171.8. The transloading portion of Accuchem's operation remains under the regulatory authority of the Department of Transportation including the items mentioned in Mr. Lennear's memo below such as security plan requirements, training, registration etc. etc.

Please let me know if you have any other questions.

Regards,

Ernie Sirotek

Inspector Lennear writes;

From: Lennear, Jonah <FRA>
Sent: Friday, February 20, 2009 5:42 AM
To: Sirotek, Ernie <FRA>
Subject: Accuchem Writeup

February 20, 2009

To: Ernie Sirotek, Hazardous Materials Specialist, Region 7, Sacramento, CA

On January 13, 2009, I performed a hazardous materials inspection at the Accuchem Facility in El Centro, CA.

Accuchem is a transloader of Hydrochloric Acid, 8, UN1789, PGII and other non-hazardous materials to tank trucks for highway delivery at nearby power plant. Accuchem recieves the acid cars via rail by the UP. I additionally verified that Accuchem is only a transloader of hazardous materials by asking that specific question and by performing the inspection and viewing documentation. Accuchem will also in the future be operating a bio-diesel plant contained within their facility. Completion on the plant is near to complete.

While on their premises I documented their security plan, hazmat training, security training, registration, exemptions, tank cars, placards, stenciling, derail protection, closures. DOT SP 11761 and 11865. Accuchem has one pump to Transload the material from tank cars to tank trucks and two side tracks within the facility to store more than 10 cars at a time. In addition I also photographed their transloading process and their bio-diesel plant. The employees were very cooperative and forthcoming with all required DOT documentation during the inspection process. No defects were noted at this time.

Jonah Lennear

Hazardous Materials Inspector, Region 7

I have attached this email herein for review.

Kindly note, that some of these people are DTSC peers while others operate at the federal level. This information was sent to DTSC on the 23rd of February, DTSC's decision was dated March 9, 2009. DTSC had this information in their possession for fourteen days [two weeks] before they finished composing their findings. It seems as though the DTSC chose to ignore everyone with regulatory authority outside their own [some with more authority then DTSC] and put out a decision that will not stand up to the regulatory communities' scrutiny.

The last sentence in the EPA's Motive Power Clarification reads; "As stated earlier, EPA will continue to work with DOT to avoid regulatory confusion." This sentence was and still is a directive as defined by the word "will". It was handed down from The Federal EPA, directing state and local field agents to work with other agencies in a cooperative effort. ACC believes that the DTSC specifically ignored this directive when they composed the hearing decision.

In our understanding of the dispute resolution process, DTSC was to be an impartial arbitrator and render an unbiased decision, to this extent they failed miserably. ACC has shown that only selected information was considered by DTSC when rendering their hearing decision. ACC has clearly demonstrated that the CCR Title 19, CAL-ARP Program Regulations, HMR, FRA, PUC, and PHMSA all say that ACCU CHEM Conversion, Inc. is NOT a stationary source and, according to other state and federal regulatory bodies, including other CUPA's in the state of California, we are beyond a shadow-of-a-doubt a "transloader" and as a transloader, the CAL-ARP Regulations do not apply.

For this reason ACC is appealing the DTSC's hearing decision to the California Office of Emergency Services [OES]. We are also seeking clarification of certain terms from PHMSA.

Regards,

Phil Zlaket
Director of Manufacturing and Corporate Compliance

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